Office - Supreme Court
FILED
DEC 13 195
HAROLD B. WILLEY

Supreme Court of the United States

October Term, 1954
No. 479

BERNARD B. KANISCHER,
Petitioner,

vs

IRWIN OPERATING CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACOB RASSNER,
Attorney for Petitioner,
15 Park Row,
New York, N. Y.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320
49

TABLE OF CONTENTS

	PAGE
Jurisdiction	1
Summary Statement	1
The Decision Below	2
Statutes Involved	3
Questions Presented	3
Reasons for Allowance of the Writ	4
POINT I—The authorities relied on by the Court below are not persuasive but seem rather to support a directly contrary holding	5
POINT II—The Court below refused to consider the statutory definition or the definition laid down by this Court but adopted its own new and different interpretation of the meaning of the word "seaman"	7
POINT III—Uniformity of decision is destroyed by distinctions made on the basis of the size of the vessel, nature of its voyage and the employment terms with its seamen	9
Conclusion	11

Cases Cited

Beadle v. Spencer, 298 U. S. 124	10
Carumbo v. Cape Cod S. S. Co., 123 F. (2d) 991	8
Cosmopolitan Shipping Co. v. McAllister, 337 U. S. 783, 69 S. Ct. 1317	5, 7
Fink v. Shepard Steamship Co., 337 U. S. 810, 69 S. Ct. 1330	6
Gerradin v. United Fruit Co., 60 F. (2d) 927	6, 7

PAGE

International Stevedoring Co. v. Haverty, 272 U. S. 50 10

Jamison v. Encarnacion, 281 U. S. 635 10

McKie v. Diamond Marine Co., 204 F. (2d) 132 8

Salaky v. Atlas Tank Processing Corp. (unofficially reported), 1954 A. M. C. 80 10

Statutes Cited

28 U. S. C. § 1254(1) 1

46 U. S. C. § 688, Jones Act 3, 4, 5, 6, 7, 8, 9, 10

33 U. S. C. § 901, et seq., Longshoremen's & Harbor Worker's Compensation Act 3, 10

Supreme Court of the United States

October Term, 1954

No.

BERNARD B. KANISCHER,
Petitioner,

vs

IRWIN OPERATING CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Bernard B. Kanischer prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on August 25, 1954.

Jurisdiction

Jurisdiction to review this case is based on 28 U. S. C., §1254 (1). The opinion below was filed August 25, 1954, rehearing denied on the 14th day of September, 1954.

Summary Statement

On the 25th day of August, 1951, the petitioner was ordered over the side of the motor boat on which he was working, by its captain, the person in charge thereof, to

take the bow line so as to control said boat. Your petitioner obeyed the orders of his superior, Joseph Kaplan, got over the side of the boat safely and was holding the bow line in his hands when he was caused to be injured by reason of Kaplan suddenly starting the motor boat, without affording your petitioner a reasonable opportunity to avoid the accident or giving him any notice that Kaplan was about to start the said motor boat. When the motor boat started it struck petitioner and caused him to lose his balance and be submerged underneath the motor boat. Petitioner's both legs came in contact with the propeller of said motor boat resulting in practically total loss of the use of his left leg and almost as severe and permanent injuries to his right leg.

Kanischer sued his employer claiming his right to maintain said action predicated on the provisions of the Jones Act.

The trial court dismissed the action on the ground that the Federal Court lacked jurisdiction.

The court below affirmed the decision of the trial court and further stated that various prerequisites, such as ownership of the vessel involved, etc., were necessary for seamen to maintain an action under the Jones Act.

The Decision Below

The opinion was written after the death of Judge Strum, who sat during the oral argument in this case and concurred in this decision before his death.

The District Court dismissed the complaint on the 1st day of February, 1954.

The District Court dismissed the action at the close of the plaintiff's case on the basis that the court was without jurisdiction, holding that the respondent herein was not the owner of the vessel and that there was no employer-

employee relationship existing between the petitioner and respondent, and that there was no diversity of citizenship.

The Court erred in its decision in view of the fact that this action is predicated upon the provisions of the Jones Act, 46 U. S. C., §688.

The Court below held that the petitioner was employed by the respondent as a cabana boy, whose regular duties were those of a landsman and not of a seaman, therefore he was not entitled to the benefits of the Jones Act, and affirmed the decision of the trial Court.

The fact that petitioner was doing the work of a seaman at the time he was injured was not given due consideration.

Statutes Involved

Section 33 of the Merchant Marine Act of 1920; 41 Stat. 988, §250, 46 U. S. C., §688; Longshoreman's & Harbor Worker's Compensation Act, 33 U. S. C., §901, *et seq.*, 44 Stat. 1424.

Questions Presented

1. In the event of the death of a Court of Appeals Judge, who sat during the oral argument of a case and expressed concurrence in a decision, may the surviving two judges write an opinion and render a decision after his death, or must the matter be set again for argument before three Court of Appeals Judges?

2. Do the provisions of the Jones Act, 46 U. S. C. §688, apply to unorganized personnel and temporary company, suffering maritime tort in the course of doing work traditionally performed by seamen?

3. Is ownership or ownership *pro hac vice* of an employer a prerequisite for liability under the Jones Act for a martime tort suffered by its employee?

Reasons for Allowance of the Writ

The opinion was written and the decision rendered after the death of Judge Strum, who was one of the three judges of the United States Court of Appeals for the Fifth Circuit, the Court below, who sat during the oral argument in this case.

Remedial legislation granted by Congress, 46 U. S. C. §688, commonly known as the Jones Act, has been curtailed and limited in a manner which appears to be contrary to the intent of Congress.

The requirements enunciated by the Court below as prerequisites for a seaman invoking the Jones Act constitutes new principles of law which seem to be at variance with the decisions of this Court.

Title to a vessel; the profitable or non-profitable nature of the ship's venture; the size of the vessel; the composition of the ship's personnel; the regular or occasional duties of the seamen thereon; the direct or remote control by the employer, have never been considered factors in the right to maintain an action under the Jones Act.

The law seems well settled that the basis for maintaining an action pursuant to the provisions of the Jones Act is the factual showing of an employer-employee relationship between the parties, the employee suffering a maritime tort during the course of his employment while performing the usual duties of a seaman, and not the title to the vessel nor the terms of contracts of employment of men thereon.

POINT I

The authorities relied on by the Court below are not persuasive but seem rather to support a directly contrary holding.

The Court below in sustaining the trial Court stated as follows:

> "On those findings he held that the action could not be maintained under the Jones Act and would have to be dismissed, as it had not been made to appear that the defendant was either the owner or the owner pro hac vice of the boat at the time of the accident, citing Fink v. Shepard Steamship Co., 337 U. S. 810; Cosmopolitan Shipping Co. v. McAllister, 337 U. S. 783; Gerradin v. United Fruit Co., 60 F. 2d 927" (p. 206).

It seems the holding given these decision by the Court below is contrary to, and in conflict with, that given by this Court.

The United States Supreme Court in the case of *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783, 69 S. Ct. 1317 (1949), held that under the Jones Act only one person, firm or corporation can be sued as an employer. The exact language appearing at page 791 being as follows:

> "The seamen's substantive rights are the same whoever is the employer".

The Court further held on page 790:

> "* * * 'Employment' should be construed so as to give protection to seamen for torts committed against them by those standing in the approximate relation of employer, * * *"

In the case of *Fink* v. *Shepard S. S. Co.*, 337 U. S. 810, 69 S. Ct. 1330, this Court stated at page 812:

> "The question here is identical with that in McAllister" * * *.

This Court further stated at page 813:

> "It establishes that respondent was neither the employer of officers on vessels such as the Davidson nor a party to such a relation with them that it could be held vicariously liable for their torts."

At page 815 this Court spoke of an owner or owner *pro hac vice* of a vessel as being liable for wages, but pointed out that such liability stemmed from the contract of employment.

It would seem that the title to the vessel is immaterial. This Court summarized liability under the Jones Act as grounded on the relationship of employer and employee.

In the case of *Gerradin* v. *United Fruit Co.*, 60 F. (2d) 927, Judge Augustus N. Hand, in the opinion writing for the unanimous Court, traced the remedial legislation pertaining to seamen.

At page 929 it was pointed out that the seamen acts are concerned with American owned ships, but it is quite clear that the right of action is against the employer of the seaman, irrespective of the flag of the vessel.

The Court stated at page 929:

> "There can be no doubt about the power of Congress to impose liability upon its own citizens for acts done on the high seas or at other places outside its territorial jurisdiction. American Banana Co. v. United Fruit Co., 213 U. S. at page 356, 29 S. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047. Section 33 of the Merchant Marine Act (46 USCA §688) has done

this in the case of American citizens who own ships on which seamen are injured through their negligence, and it seems but a slight disregard of the symbol of foreign registry to apply an ordinary rule of torts to a shipowner who bears such an illusory shield. The question is not one of power, but of the meaning and scope of Rev. St. § 4612."

The Jones Act specifically speaks of an action by an employee against an employer without reference to title to the vessel. So, also in the case of *Gerradin* v. *United Fruit Co., supra,* the Court did not permit an "illusory shield" to exonerate an employer from the consequences of his wrongful act.

The Order (Tr. pp. 19, 20 and 24) provided that Irwin Operating Co. was the employer.

Under the authority of the *Cosmopolitan* case, *supra,* Irwin Operating Co., was the proper party and the only party against whom the Jones Act cause of action could lie by its employee, Kanischer, for maritime tort.

POINT II

The Court below refused to consider the statutory definition or the definition laid down by this Court but adopted its own new and different interpretation of the meaning of the word "seaman".

The Jones Act has always been liberally construed to give protection to workers injured on ships, leaving disputed factual issues to the jury's determination.

Whether or not Kanischer was given an order emanating from his employer would seem to be a question of fact to be determined by a jury and not by an Appellate Court.

Kanischer did all the work commonly performed by a seaman. A person employed to work aboard a vessel (Tr.

pp. 133, 139); who paints the vessel (Tr. pp. 131, 172-173, 185); who handles gear (Tr. p. 137); or lines and anchor (Tr. pp. 73, 74, 87, 92, 116, 134-137, 139-140, 142, 179); cleans the vessel (Tr. pp. 134, 137); scrubs the decks (Tr. pp. 142, 143); handles equipment (Tr. pp. 140-142); cuts bait for the benefit of passengers (Tr. pp. 73, 74, 135, 87-141), and puts it in place and aids in its navigation is a seaman. *McKie v. Diamond Marine Co.*, 204 F. (2d) 132 (5th Cir.).

The maritime expert witness, Frank Paul, testified that in the Miami area, with which he was most familiar, a person who was employed and ordered to do these things was a seaman (Tr. pp. 191, 194-195).

It was error for the Court to rule as a matter of law that Kanischer was not a seaman.

The question as to whether or not Kanischer was a seaman was a factual matter to be determined by the jury. *McKie* v. *Diamond Marine Co., supra.*

In the case of *Carumbo* v. *Cape Cod S. S. Co.*, 123 F. (2d) 991 (1st Cir. 1931), the Court reviewed the theories which give to a person the status of a seaman under the Jones Act.

> "The cases hold that a person who works aboard a ship cannot be a 'seaman' if the ship is not in navigation. (Citations omitted). To be a 'seaman', however, it is not required that the employee's work be in aid of navigation or that he be on board primarily to aid in navigation. (Citations omitted). Moreover, the Jones Act has always been liberally construed. (Citations omitted). 'Verbal niceties were bent to the overmastering purpose of the act to give protection to workers injured upon ships.' *Warner* v. *Goltra, supra,* 293 U. S. at page 156. It was said in that case, at page 160 of 293 U. S., (master of a tug boat) and in *Uravic* v. *F. Jarka Co.,*

(1931) 282 U. S. 234, 239 (an American citizen employed as a stevedore unloading a vessel flying the German flag in New York harbor) that the word 'seaman' in the Jones Act is to be given broader scope that 'seaman' as defined in 46 U. S. C. A. 713:

'In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the U. S. shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river * * *.'

"That definition itself 'is directed to extension not to restriction'. (citation omitted) The process of liberal construction of the Jones Act cannot now be ignored because Congress has seen fit to pass the Longshoremen's Act. As a result of the cases, we feel constrained to hold that one who does any sort of work aboard a ship in navigation is a 'seaman' within the meaning of the Jones Act" (pp. 994, 995).

The Court below seems to have adopted a contrary view.

POINT III

Uniformity of decision is destroyed by distinctions made on the basis of the size of the vessel, nature of its voyage and the employment terms with its seamen.

The fact that the vessel involved was a motor boat does not make it any less subject to the Jones Act than if it were a merchant vessel.

The Court in the case of *Salaky* v. *Atlas Tank Processing Corp.* (unofficially reported), 1954 A. M. C. 80, held that even a row boat came within the provisions of Admiralty jurisdiction, stating as follows:

> "Libellant may recover for damages to the row boats involved in this suit. Section 740 of Title 46, U. S. Code, which was enacted subsequent to Perry v. Haines, 191 U. S. 17, extends the admiralty jurisdiction 'to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, * * *' and as I read the statute it includes row boats and all articles of personal property" (pp. 80, 81).

Insofar as no distinction is made in Admiralty by reason of the size and type of vessel, there does not seem to be any justification to draw a distinction in a Jones Act case.

An action under the provisions of the Jones Act, may be maintained against an employer who is not the owner of the vessel. *International Stevedoring Co. v. Haverty,* 272 U. S. 50; *Beadle* v. *Spencer,* 298 U. S. 124; *Jamison* v. *Encarnacion,* 281 U. S. 635.

With the passage of the Longshoremen's and Harbor Worker's Compensation Act in 1927, 33 U. S. C. A. 901, *et seq.,* material changes were made as to the rights of longshoremen but not as to the rights of seamen under the Jones Act against an employer, who was not the owner of the ship in question.

CONCLUSION

For the reasons set forth above, we respectfully submit that this Court should issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in this cause.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

Opinion and Order of Dismissal for Lack of Jurisdiction

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 3926-M-Civil

BERNARD B. KANISCHER,

Plaintiff,

vs.

JOSEPH KAPLAN, CADILLAC HOLDING CORP., a Florida corporation, IRWIN OPERATING CO., a Florida corporation jointly and severally,

Defendants.

Filed
Miami Fla
Feb 1 1954
JULIAN A. BLAKE, Clerk

This cause came on for trial before the undersigned Judge and a Jury. At the conclusion of plaintiff's case, the defendant Irwin Operating Co. moved the Court to direct a verdict in favor of the defendant, or, in the alternative, to dismiss the cause for lack of jurisdiction.

This is an action under the Jones Act, 46 U. S. C. A. Sections 688 et seq., brought by an employee against his employer, contending that he was injured while on a fishing trip aboard the boat Jo Ann, due to the negligence of one Joseph Kaplan, who was the sole owner and in possession

and control of the boat at the time of the accident. There is no evidence to show that there was any connection between the defendant Irwin Operating Co. and the operation of the boat Jo Ann or that Kaplan was operating the same as the agent, servant or employee of this defendant or otherwise. It follows, therefore, that this action cannot be maintained under the Jones Act, as it has not been made to appear that the defendant was either the owner or the owner pro hac vice of the boat at the time of the accident. *Fink* v. *Shepard Steamship Company*, 69 S. Ct. 1330, 33 U. S. 810, 93 L. Ed. 1709; *Cosmopolitan Shipping Company* v. *McAllister*, 69 S. Ct. 1317, 337 U. S. 783, 93 L. Ed. 1692; *Gerradin* v. *United Fruit Company*, 60 Fed. (2d) 927. It is unnecessary to rule on the other grounds assigned in support of the motion.

Accordingly, it is ORDERED AND ADJUDGED that this action be and the same is hereby dismissed as to the defendant Irwin Operating Co., for lack of jurisdiction, and said defendant go hence without day, together with its costs to be taxed by this Court.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, on this the 1st day of February, A. D., 1954.

C. C. WYCHE,
United States District Judge,
Sitting by Designation.

Opinion

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14996

BERNARD B. KANISCHER,
Appellant,

versus

IRWIN OPERATING CO.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(August 25, 1954.)

Before HOLMES and STRUM, Circuit Judges, and THOMAS, District Judge.

THOMAS, District Judge: Naming as defendant his employer, a corporation operating a resort hotel at Miami Beach, and one Kaplan, owner and operator of the speed boat "Jo Ann", appellant filed suit under the Jones Act, 46 U. S. C. A. § 688, for serious injuries to both legs, resulting from contact with the propeller of the boat on August 25, 1951.

In sequence, motions to dismiss for want of jurisdiction under the Act and for summary judgment on the same ground were filed by the employer-defendant, appellee here. After each motion had been denied by the district judge, the case came on for a pre-trial hearing, as a result of which it was stipulated, among other things, that the relationship of employer and employee did not exist between Kaplan and the plaintiff. On consideration of this stipulation, the trial judge, with plaintiff's consent, transferred the suit against Kaplan to the admiralty docket, and allowed the case against the defendant-employer to proceed to trial before a jury. When the plaintiff had rested his case, defendant moved the court to direct a verdict for the defendant or, in the alternative, to dismiss the case for lack of jurisdiction.

The trial judge found that Kaplan was the sole owner and was in possession and control of the boat at the time of the accident; and that there was no evidence to show that there was any connection between the defendant-employer and the operation of the boat "Jo Ann", or that Kaplan was operating the boat as the agent, servant or employee of the defendant. On those findings he held that the action could not be maintained under the Jones Act and would have to be dismissed, as it had not been made to appear that the defendant was either the owner or the owner *pro hac vice* of the boat at the time of the accident, citing *Fink* v. *Shepard Steamship Co.*, 337 U .S. 810; *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783; *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927.

We agree with the result, but we do not think this reasoning is wholly dispositive of the case. Other phases of this litigation, we believe, are of equal importance and should be discussed. Pertinent portions of the record disclose the following facts:

Opinion

Appellant had been employed by appellee for several years as a cabana boy, whose duties were to look after the bathhouses on the beach and to wait upon the guests who occupied these cabanas during the day. For the winter season plaintiff-appellant testified his tips were sufficiently remunerative, and he received no additional compensation from the hotel. During the summer months, he received a monthly salary of $50, plus tips. His hours were approximately from 8:00 a. m. to 6:00 p. m. When he was not busy looking after the cabanas and waiting on guests, he could, after obtaining permission of a superior, fish during working hours from the jetties, or swim, or otherwise amuse himself. He liked to fish, and sometimes took the small guests of the hotel fishing from the jetties.

On two occasions prior to the day on which he received disabling injuries from the propeller of the "Jo Ann", he had been fishing with Kaplan on Kaplan's pleasure boats. Appellant maintains that on those occasions and on the day of the injury his status was that of a seaman, engaged in marine employment, acting under the direction of his employer to do whatever Mr. Kaplan wanted. The "Jo Ann" was an eighteen-foot pleasure craft with an inboard motor, and had a propeller designed for high speed. She was owned and operated by Kaplan. The hotel corporation had no interest of any sort in her or in any other boat. Kaplan, however, was financially interested in the hotel, though he had nothing to do with its management. On the day of the accident, he took fishing with him two young teen-age relatives, the appellant, and appellant's friend, a lifeguard. They were out about an hour and a half, during which time appellant testified he handled the anchor, cut bait, baited hooks, cleaned fish, straightened out fishing tackle, did some fishing himself, and cleaned up the boat. Upon returning to the beach, appellant got out of the boat—he claims at the direction of Kaplan—to hold it and prevent scraping on the

bottom. An unexpected maneuver of the boat caught him off guard, and sucked him into the revolving propeller.

It is unnecessary to detail appellant's version of the accident. Our concern is to determine whether or not under the pleadings, the pre-trial stipulation, and the testimony offered by the plaintiff in the court below, the court had jurisdiction of the cause.

Under the Jones Act, a seaman may bring an action at law against his employer for personal injuries sustained in the course of his employment. In an action under the Jones Act, the burden of proof is on the plaintiff to establish negligence on the part of the defendant. The Jones Act applies only to masters and members of the crew. We must therefore analyze the facts in this case to determine whether or not appellant as plaintiff places himself within the scope of the Jones Act.

(1) Was he a seaman? *McKie* v. *Diamond Marine Co.*, 204 F. 2d 132, 135.

(2) Did he sustain personal injuries in the course of his employment as a seaman?

(3) Was he the master or a member of the crew of the vessel involved? *McKie* v. *Diamond Marine Co., supra; Maryland Casualty Co. et al.* v. *Lawson, Deputy Commissioner, et al.*, 94 F. 2d 190, 192.

(4) Was the defendant the owner *pro hac vice* of the "Jo Ann" at the time of the accident?

(5) Has plaintiff shown any negligence on the part of his employer?

The appellant was employed by the defendant as a cabana boy. The duties of a cabana boy are those of a landsman, and not of a seaman. The appellant, as do many others, enjoyed fishing. He had gone fishing previously on

the "Jo Ann". He went fishing on the "Jo Ann" on the day of the accident. Irwin Operating Co. did not employ him as a seaman, and his going fishing on the "Jo Ann" on the date of the accident was not even incidental to his employment. But even assuming that the evidence discloses, which we do not agree, that he was instructed by his superior to go fishing with Mr. Kaplan on the day in question, then the fishing trip would certainly be only incidental to his employment by the hotel. Even had appellant been an experienced seaman, and even had he held seaman's papers, we would still have to refer back to proposition (2): Was he injured in the course of his employment as a seaman? Employment contemplates the relationship of employer and employee. He was not employed by the Irwin Operating Co. as a seaman but as a landsman, and his going on the "Jo Ann" on the day in question did not make him a seaman *pursuant to his contract of employment with the defendant.*

Assuming, however, that the appellant has met the burden of proof by establishing that he was a seaman and that he was injured in the course of his employment as a seaman, then we are confronted with proposition (3): Does he come under the Jones Act as master or member of the crew? The evidence definitely shows that he was not master. If the "Jo Ann" had a master, it was Kaplan. Then, was appellant a member of the crew? Our thoughts are directed along the line marked by this court in *Lawson, Deputy Commissioner, et al.* v. *Maryland Casualty Co.*, 94 F. 2d 193, as follows: "In a loose sense he was of the crew of the skiff, but we do not think a rowboat less than sixteen feet long, capable of carrying three men, and propelled by one oar at its stern, is a vessel having a crew within the meaning of this law [Longshoremen's and Harbor Workers' Compensation Act], in spite of the very broad definition of a vessel

found in 1 U. S. C. A. § 3. Such a boat usually has no organized personnel, no permanent company."

The "Jo Ann" was a speed boat eighteen feet long, propelled by an inboard motor. She was privately owned by Kaplan, and the record indicates that she was used exclusively as a pleasure boat by Kaplan and not for commercial purposes. But we are not concerned with her usual use. We are concerned with her use on the day in question. Kaplan wanted to go pleasure fishing. He wanted to take two young friends pleasure fishing. He invited appellant to go with him, and you may call it either as a guest or as one to assist with the boat. It makes no difference. On the day in question, appellant was not a member of the organized personnel or crew of the ship. We do not think that Congress ever intended the Jones Act to cover two or three friends duck hunting in a skiff or fishing from a privately-owned, non-commercial, eighteen-foot speed boat, even though on navigable waters.

Kaplan during the entire fishing trip and at the time of the accident was on a pleasure fishing trip solely initiated by him. Kaplan was the owner of the boat. The trip was never intended to be of any benefit to the defendant. The trip was not in furtherance of the business of the defendant. During the entire trip there was no agency relationship between Kaplan and the defendant. The defendant during the trip and at the time of the accident was not the owner *pro hac vice* of the "Jo Ann."

But assuming that the plaintiff-appellant has met the burden of proof on all of the first four propositions, we are then confronted with the question of negligence. The law suit is against Irwin Operating Co. Assuming that appellant's superior, acting for Irwin Operating Co., and acting within the line and scope of his employment, did direct appellant to go fishing with Kaplan on the occasion in question, is that negligence? We think not. There is no evi-

dence in the record that the defendant knew or should have known at the time that Kaplan was an incompetent operator, if indeed he was. If there be negligence, whose negligence was the proximate cause of the accident? Appellant says it was Kaplan's. In order for appellant to recover against the Irwin Operating Co. for Kaplan's negligence, appellant would further have the burden of proving that Kaplan at the time he committed the alleged negligent act was the servant, agent or employee of Irwin Operating Co., and as such was acting within the line and scope of his authority. *Reece* v. *Ebersbach, et al.*, 9 So. 2d 805, 152 Fla. 763, certiorari denied 318 U. S. 784; *Tobler* v. *Pioneer Mining & Mfg. Co.*, 52 So. 86, 166 Ala. 482. The record does not support such a finding.

While we realize that this case was disposed of in the lower court on the jurisdictional feature, we have discussed the issues of line and scope, and negligence, as both are involved in the application of the Jones Act, and we think that under the facts in this case these two features are pertinent and inescapable.

It is our opinion that at the time of the accident (1) appellant was not a seaman; (2) he did not sustain his injuries in the course of his employment as a seaman; (3) he was not the master or a member of the crew of the "Jo Ann" at the time of the accident; (4) the defendant was not the owner *pro hac vice* of the "Jo Ann" at the time of the accident; and (5) appellant has shown no negligence on the part of Irwin Operating Co.

For these reasons appellant has failed in his effort to bring this case within the terms of the Jones Act and the ruling of the lower court is affirmed. No costs to be taxed.

AFFIRMED.

Judge Strum sat during the oral argument of this case and concurred in this decision, but died before the opinion was written.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Filed
Miami Fla
Oct 4 1954
JULIAN A. BLAKE
Clerk

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judge of the United States District Court for the Southern District of Florida.—GREETING:

WHEREAS, lately in the United States District Court for the Southern District of Florida, before you, in a cause between Bernard B. Kanischer, plaintiff, and Joseph Kaplan, Cadillac Holding Corp., Irwin Operating Co., jointly and severally, defendants, No. 3926-M-Civil, wherein the judgment of the District Court entered in said cause on the 1st day of February, A. D., 1954, was in favor of defendants, Irwin Operating Co., and against plaintiff, Bernard B. Kanischer, as by the inspection of the transcript of record of the said District Court, which was brought into the United States Court of Appeals for the Fifth Circuit, by virtue of an appeal sued out by Bernard B. Kanischer,

agreeably to the act of Congress in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hundred and fifty-three, the said cause came on to be heard before the said United States Court of Appeals, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed: No costs to be taxed.

August 25, 1954.

"Judge Strum sat during the oral argument of this case and concurred in this decision, but died before the opinion was written."

YOU, THEREFORE, ARE HEREBY COMMANDED that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeal . . . notwithstanding.

WITNESS the Honorable EARL WARREN Chief Justice of the United States, the 29th day of September, in the year of our Lord one thousand nine hundred and fifty-four.

JOHN A. FEEHAN, JR.,
Clerk, U. S. Court of Appeals
for the Fifth Circuit.